INDEX

CITATIONS

677940—46——1

In the Supreme Court of the United States

OCTOBER TERM, 1945

Nos. 650 and 651

WILLIAM B. DENNY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 103–112) has not yet been reported.

JURISDICTION

The judgments of the circuit court of appeals were entered November 5, 1945 (R. 113–115). The petition for writs of certiorari was filed December 10, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the indictments were defective for indefiniteness and for failure to charge a criminal offense.

2. Whether the evidence was sufficient to show that a false statement made by petitioner to officials at an induction center had any relation to his fitness for service under the Selective Training and Service Act of 1940.

3. Whether the circumstances under which petitioner's partial confession was made were such as to render it involuntary as a matter of law.

STATUTES INVOLVED

Section 37 of the Criminal Code (18 U. S. C. 88) provides as follows:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

Section 11 of the Selective Training and Service Act of 1940, c. 720, 54 Stat. 885, 894–895, as amended (50 U. S. C. App. 311), provides in pertinent part as follows:

> * * * and any person who shall knowingly make, or be a party to the making of, any false statement or certificate

as to the fitness or unfitness or liability or nonliability of himself or any other person for service under the provisions of this Act, or rules, regulations, or directions made pursuant thereto, or who otherwise evades registration or service in the land or naval forces or any of the requirements of this Act, or who knowingly counsels, aids, or abets another to evade registration or service in the land or naval forces or any of the requirements of this Act, or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act, or any person or persons who shall knowingly hinder or interfere in any way by force or violence with the administration of this Act or the rules or regulations made pursuant thereto, or conspire to do so, shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, * * *.

STATEMENT

Petitioner was indicted in the District Court for the District of Maryland in two cases. The first indictment charged that petitioner and one Chester T. Ruby had conspired "to cause the evasion" by petitioner of service in the armed forces, and

five overt acts were alleged to have been committed in furtherance of this conspiracy: (1) petitioner asked Ruby to get him a rejection; (2) Ruby instructed petitioner as to statements he should make at the induction center in order to give the appearance of extreme nervousness; (3) petitioner agreed to pay Ruby $250 for his assistance; (4) petitioner made false statements during the course of his examination at the induction center; (5) petitioner paid Ruby $250. (R. 1–3.) The second indictment charged that petitioner "did knowingly * * * make false statements as to his fitness for service" to officials at the induction center, in that he "did falsely state to said officials that he was a high school graduate, in order to avoid taking the mental qualifications test; and did give other false information, which was intended to cause his rejection for service" (R. 5–6). Demurrers were filed to both indictments on the ground of indefiniteness and failure to state a criminal offense (R. 3–5, 6–7). These were overruled and, after trial, petitioner was found guilty under both indictments (R. 7). He was sentenced to five years' imprisonment on the substantive charge and two years on the conspiracy charge, the second sentence to run concurrently with the first (R. 7–8). The Circuit Court of Appeals for the Fourth Circuit affirmed the judgments (R. 113–115).

The evidence for the Government as to the false statements may be summarized as follows:

Petitioner asked Ruby, a Chief Petty Officer stationed at the induction station in Baltimore, Maryland (R. 77), to get him a rejection or a 4–F classification; he offered $250 or $300 for Ruby's aid and ultimately paid him the amount agreed upon (R. 48, 80, 83, 84, 86, 88). Ruby instructed petitioner how to demean himself upon reporting to the induction center—to state that he was a high school graduate, to exaggerate his nervous condition, to say that he "suffered with severe headaches" and "dizzy spells and liked to be alone and wanted to avoid people and crowds" (R. 29, 81–82, 84, 87, 88). When petitioner reported to the induction center, he stated that he was a high school graduate, and behaved in such a manner as to cause the officials to disqualify him because of "schizophrenia—paranoid reactions" (R. 19–21). One of the two psychiatrists who were responsible for his rejection noted that he was "fearful of being with people, becomes very anxious"; both psychiatrists testified that their conclusions were based upon questions asked petitioner, his answers, and observation of his appearance (R. 23–28, 75–77). Petitioner is not a high school graduate (R. 59–60). From January 1935 to January 1944, he was engaged in the hotel and real estate business with average earnings of

$5,000 a year (R. 74). In October 1943, he was owner, operator, and manager of a 56-room hotel, in which he had invested his life savings in excess of $30,000; the hotel was filled to capacity with defense workers, and he was giving twelve hours a day, seven days a week, to the work and was assisted by ten employees (R. 98–99; Ex. 7).[1] In January 1944, he was owner of one hotel and operator and manager of two others; he was engaged in remodeling the two latter and was buying all the equipment himself (R. 73–74, 98–99; Ex. 5). He occasionally went to boxing matches which were attended by large crowds (R. 92). A psychiatrist, called by petitioner as an expert witness, testified that his examinations of petitioner led him to believe that he was suffering from schizophrenia; but on cross-examination the Government brought out that the witness had been told little or nothing about petitioner's activities in the hotel business (R. 49–55, 92–93).

The evidence adduced by the Government concerning the circumstances of petitioner's partial confession is as follows:

A government agent asked petitioner to come to the F. B. I. office for the purpose of giving in-

[1] Pursuant to stipulation (R. 115–116) the printed record for the purpose of the petition for certiorari consists of the appendices to the briefs in the circuit court of appeals. The exhibits have been filed separately, together with the stenographic transcript of record transmitted by the clerk of the court below, in accordance with the stipulation.

formation about a woman of his acquaintance who was under investigation (R. 33). Petitioner arrived at the office some time between 3:30 and 3:45 p. m. and left at 6:05 p. m. (R. 34, 43). It was an extremely hot day (R. 34). The interview began in a very small room, but because there was no appreciable circulation of air, the parties later moved into a considerably larger room (R. 35). Twenty or thirty miunutes were spent in discussion of the woman (R. 34, 43). Then the two agents who were present told petitioner they were investigating Selective Service violations and asked him whether he knew Ruby and whether he cared to give them any information about his own draft status and his relations with Ruby (R. 34, 43). Although he was told that he did not need to tell anything, he proceeded to explain in rather complete detail that he had asked Ruby to procure his rejection and that he paid Ruby $250; he said nothing concerning his false statements as a means of causing his rejection (R. 34, 43–44, 47–49, 89). One of the agents took notes as petitioner told his story, and then from these notes compiled a statement covering about two and one-third pages in longhand, checking its correctness with petitioner as he went along (R. 34–35, 44, 45). Petitioner read the statement and signed it (R. 49, 89, 92). There were no threats or promises of any kind, and petitioner was not under arrest nor was he refused permission to

leave (R. 34, 37–38, 90, 91–92). One of the agents testified that petitioner was fairly calm during the preparation of the statement, showed emotion only at one point, and looked all right when he went out (R. 44–47). The other agent testified that after the statement had been signed, petitioner became quite concerned over the seriousness of the situation; he grew so wrought up that the agent was afraid he might commit suicide and spent the last fifteen or twenty minutes petitioner was in the office trying to reassure him that the inquiry was only a "normal" one, and that although it appeared that he had violated the law, all the facts would be presented to the United States Attorney for his determination as to whether a prosecution would be instituted (R. 36–38).

ARGUMENT

1. We submit that petitioner's contentions as to the indictments are not such as to merit allowance of the petition.

a. Petitioner complains that the conspiracy indictment[2] was defective in two respects. First,

[2] The conspiracy indictment was brought under Section 37 of the Criminal Code (R. 3) instead of under the conspiracy clause of Section 11 of the Selective Service Act. In *Singer* v. *United States*, 323 U. S. 338, 345 (fn. 5), this Court reserved decision of the question whether any conspiracy to violate Section 11 can still be prosecuted under Section 37. Petitioner has not raised this point, and we think it a matter of purely academic interest in this case. Petitioner received the

it failed to allege that petitioner was a person of such an age as to make him subject to the Selective Service Act; hence, it omitted an essential element of the crime and failed to state an offense (Pet. 3, 14, 15–17, 21–25, 27–29). Two circuit courts of appeals have held that such an allegation is unnecessary. *United States* v. *Wagoner,* 143 F. 2d 1 (C. C. A. 7), certiorari denied, 323 U. S. 730; *Hopper* v. *United States,* 142 F. 2d 167, 169, and 142 F. 2d 181, 184 (C. C. A. 9). Second, it charged conspiracy to cause evasion of service under the Act in generic terms without specifying the particular type of evasion; hence, petitioner argues, it was so vague and ambiguous as to fail to inform petitioner of the precise charges against him and exposed him to danger of double jeopardy (Pet. 14, 25–26). The court below rejected this contention and held that the indictment was sufficiently specific (R. 104). In this, its decision is in conflict with *Caldwell* v. *United States,* 139 F. 2d 121, 124 (C. C. A. 5), and with *United States* v. *Offutt,* 127 F. 2d 336, 339 (App. D. C.). However, petitioner's sentence under the conspiracy indictment is only two years and runs concurrently with the five year sentence on the substantive indictment. Conse-

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maximum of two years under Section 37, whereas he could have been sentenced to five years under Section 11, and the two year sentence runs concurrently with the five year sentence imposed for making false statements. The fact that the proceeding was brought under Section 37 was in his favor.

quently, if the latter is found to be good, the conflict does not avail petitioner. *Hirabayashi* v. *United States,* 320 U. S. 81, 105.

b. The substantive indictment charged that petitioner knowingly made false statements as to his fitness for service in that he said he was a high school graduate and gave "other false information, which was intended to cause his rejection" (R. 5–6). In the court below, petitioner argued that the allegation that he made false statements as to his fitness for service was too broad and too ambiguous to stand alone, and that the attempted particularizations failed to state the essential elements of a crime. The court agreed to the extent of holding that the last clause alleging that petitioner gave "other false information" was too broad, but it held that it could be rejected as surplusage, leaving the rest of the indictment to stand as a sufficiently specific charge (R. 105–106). Petitioner has now altered his position, and is contending here that this final clause, held "surplusage" by the court below, was highly prejudicial to him in that most of the evidence which was harmful to him came in under it (Pet. 5, 14–15, 17–18, 29–31). He argues that the only evidence admissible against him was that which related to the specific false statement charged, namely, that he was a high school graduate, and that it was only the faulty clause of the indictment which permitted the Government to

get before the jury evidence as to his personal business, his physical appearance at the induction center, his physical and mental examinations there, and the testimony of the psychiatrists called by the Government (Pet. 30–31).

However, we think the indictment was sufficiently specific and required no further particularization. It charged that in Baltimore, Maryland, on or about March 22, 1944, petitioner, "being a person duly registered * * * did knowingly * * * make false statements as to his fitness for service under the provisions of the aforesaid act to officials of the Induction Center, Fifth Regiment Armory, Baltimore, Maryland" (R. 5–6). The charge follows the language of the Act. It is a general rule that such language is sufficient if it fully, directly, and expressly, without uncertainty or ambiguity, sets forth all the elements necessary to constitute the offense. *Ledbetter* v. *United States,* 170 U. S. 606, 609–612; *Potter* v. *United States,* 155 U. S. 438, 443–445; *Dunne* v. *United States,* 138 F. 2d 137, 145 (C. C. A. 8), certiorari denied, 320 U. S. 790; *United States* v. *Henderson,* 121 F. 2d 75, 78 (App. D. C.). When a statute uses generic terms, such as "duty" or "evasion," further particularization is necessary. *United States* v. *Cruikshank,* 92 U. S. 542, 558. Even the phrase "false statements" has been held too general. *Foster* v. *United States,* 253 Fed. 481, 482

(C. C. A. 9). Cf. *United States* v. *Pelley,* 132 F. 2d 170, 179 (C. C. A. 7), certiorari denied, 318 U. S. 764. But this statute particularizes. It penalizes false statements as to fitness for service. And the indictment further specified that the statements were made to the officials at a definite induction center on a definite day. Consequently, the evidence of which petitioner complains was properly admitted under the indictment without reference to the last clause.

When an indictment sets forth all the essential elements of the offense and is good against a general demurrer, yet leaves the defendant in some uncertainty as to what he is to be called upon to meet at the trial, the remedy is by a bill of particulars. *Glasser* v. *United States,* 315 U. S. 60, 66; *Billingsley* v. *United States,* 16 F. 2d 754, 755 (C. C. A. 8); *O'Neill* v. *United States,* 19 F. 2d 322, 324 (C. C. A. 8); *United States* v. *Yoffe,* 52 F. Supp. 175, 177 (D. Mass.). Petitioner went to trial without seeking such a remedy. Furthermore, it is our view that the record shows affirmatively that he was in no way surprised and suffered no prejudice from the admission of evidence tending to show his false statements other than the one particularly specified in the indictment. He knew from the enumeration of the overt acts in the conspiracy indictment (R. 2–3) that he was accused of having made false statements as to his mental condition. And that he was fully prepared to meet these charges is shown

by the fact that he put on the stand a psychiatrist of long experience who testified that petitioner was actually afflicted with schizophrenia (R. 49–55).

2. Petitioner's next contention is that the Government did not prove that his statement that he was a high school graduate had any relation to his fitness for service (Pet. 4, 15, 18–19, 31–34). The argument is that the statement in itself permits no inference of relationship to fitness, that there was positive evidence that it had nothing to do with acceptance or rejection, that the Government adduced no proof that it had relation to fitness but substituted a theory that the delay consequent upon taking a literacy test might have enabled the officials to ascertain that petitioner was qualified for service, and that in the absence of proof that the statement had a tendency to bring about rejection, it is more reasonable to assume that it enhanced petitioner's chance of acceptance (Pet. 32–34).

There was sufficient evidence to prove that petitioner did tell the officials that he was a high school graduate (R. 20–22). Those who were not such graduates were held at the induction center for a further test (R. 21). Ruby, who had instructed petitioner to make the statement, explained that the purpose was "merely to get the man out of the station as soon as possible. Sometimes it would take thirty, forty, fifty minutes

for a mental examination as to his schooling" (R. 29). This was sufficient to bring petitioner within the provision of the Act penalizing false statements as to fitness for service. We think it obvious that any answer given by petitioner to a question as to whether he was a high school graduate would have relation to his fitness for service, for the Act specifically states that "no man shall be inducted for training and service under this Act unless and until * * * his * * * mental fitness for such training and service has been satisfactorily determined." Section 3 (a) of the Selective Training and Service Act of 1940, 50 U. S. C. App. 303 (a). The question was asked as a step in the determination of petitioner's mental fitness, and he answered it falsely. The apparent strength of petitioner's argument lies in the fact that his false answer on its face made him more, rather than less, liable for service. But the evidence shows that his real purpose was evasion of service and that this was accomplished.

Furthermore, even if this particular statement as to his education had no relation to fitness for service, it cannot be doubted that petitioner's other statements as to his mental condition did have such relation. As we have shown above (*supra,* pp. 10–12), evidence as to these latter statements was admissible under the indictment, and petitioner does not challenge the sufficiency of that evidence.

3. Petitioner's final contention is that the evidence shows his confession to have been involuntary as a matter of law (Pet. 4, 15, 19–20, 34–44). It is asserted that there was uncontradicted evidence that petitioner was afflicted with paranoiac schizophrenia and was of an extremely suggestible nature, so that he could be induced to say almost anything to escape from an annoying situation. It is argued that this condition in combination with the admittedly uncomfortable circumstances in which petitioner found himself in the F. B. I. office was enough to render his statement inadmissible. Furthermore, petitioner says, even though there was some conflict in the evidence, his own explanation was the more reasonable one in the light of the admitted circumstances, and should have rendered the voluntary character of the confession so doubtful as to call for its exclusion.

The whole argument falls if there was evidence to show that petitioner was mentally normal. There was such evidence. He led a very active business life; he occasionally mingled in large crowds at boxing matches; he was carefully coached by Ruby to act in a manner that would appear abnormal. Nor is it true, as petitioner asserts (Pet. 35), that the court of appeals disregarded this point. At one point the court said, "Undoubtedly this evidence tends to show that the

defendant was mentally * * * disqualified from service; but on the other hand, there was evidence * * * that the finding of the physicians as to the defendant's mental condition was the result of various false statements made by the defendant as the result of instructions given him by Ruby during the course of the conspiracy" (R. 107). And at another point the court said, "It is not impossible that the doctors were deceived as to Denny's mental condition by the statements which he made under Ruby's direction" (R. 109–110).

There was also a direct conflict as to the circumstances of the confession, for the agents testified that petitioner was cooperative and reasonably calm until after the statement had been given, and that there was no coercion whatsoever. Since there was a conflict in the evidence, the trial court was correct in submitting the question to the jury, *Wilson* v. *United States,* 162 U. S. 613, 624. This Court has said that it will not interfere with the finding in such a case "unless it is so lacking in support in the evidence that to give it effect would work that fundamental unfairness which is at war with due process." *Lisenba* v. *California,* 314 U. S. 219, 238. See also *Lyons* v. *Oklahoma,* 322 U. S. 596, 602. We think there is ample evidence to establish that petitioner's statement was wholly voluntary.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writs of certiorari should be denied.

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